125-345

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

PHILADELPHIA BAR ASSOCIATION

No. ~~1304~~ 872

JOHN C. SPENCER, PLAINTIFF IN ERROR,

vs.

CAROLINE L. MERCHANT, EXECUTRIX OF JOHN MERCHANT, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED DECEMBER 3, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1304.

JOHN C. SPENCER, PLAINTIFF IN ERROR,

vs.

CAROLINE L. MERCHANT, EXECUTRIX OF JOHN MERCHANT, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the supreme court of the State of New York, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court of the State of New York before you, or some of you, on a remittitur from the court of appeals of the State of New York, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John C. Spencer and Caroline L. Merchant, as executrix of the last will and testament of John Merchant, deceased, wherein was drawn in question the validity of a statute or an authority exercised under said statute on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity, manifest error hath happened to the great damage of the said John C. Spencer, as by his complaint appears, we being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you,

2 if judgment therein be given, that then, under —, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, the 15th day of November, in the year of our Lord one thousand eight hundred and eight-six.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk Supreme Court of the United States.

Allowed by—

SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

November 15th, 1886.

3 [Endorsed:] U. S. Supreme Court. John C. Spencer, plaintiff in error, *vs.* Caroline L. Merchant, as executrix, &c. Writ of error. Albert Day, att'y for pl'ff in error.

4 *Case on Appeal.*

Court of Appeals.

JOHN C. SPENCER, Plaintiff & App'l't,

against

JOHN MERCHANT, Defendant & Resp't.

Albert Day, counsel for appellant, 240 Broadway, N. Y; M. G. Swart, counsel for respondent.

5 STATE OF NEW YORK, *ss:*

Court of Appeals.

Pleas in the court of appeals held at the capitol, in the city of Albany, on the 8th day of December, in the year of our Lord one thousand eight hundred and eighty-five, before the judges of said court.

Witness the Hon. William C. Ruger, chief judge, presiding; E. O. Perrin, clerk.

Remittitur December 9th, 1885.

JOHN C. SPENCER, Appellant, *ag'st* JOHN MERCHANT, Respondent.

Be it remembered that on the 24th day of December, in the year of our Lord one thousand eight hundred and eighty-three, John C. Spencer, the appellant in this action, came here into the court of appeals, by Albert Day, his attorney, and filed in the said
6 court a notice of appeal and return thereto from the judgment of the general term of the supreme court of the State of New York; and John Merchant, the respondent in said action, afterwards appeared in said court of appeals, by John Merchant, attorney in person—which said notice of appeal, and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon the said court of appeals, having heard this cause argued by Mr. Matthew Hale, of counsel for the appellant (no one appearing for the respondent), and after due deliberation had thereon, did order and adjudge that the judgment of the supreme court appealed from in this action be in all things affirmed.

And it was further ordered and adjudged that the respondent recover against the appellant costs of appeal to this court.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, to be proceeded upon according to law.

Therefore it is considered that the said judgment be in all things affirmed, with costs as aforesaid, and stand in full force, strength, and effect.

7 And hereupon, as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York,

before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

E. O. PERRIN,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals.

CLERK'S OFFICE, ALBANY, *Dec'r 9th*, 1885.

I hereby certify that the preceeding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

E. O. PERRIN, *Clerk.*

8 Supreme Court, County of Kings.

JOHN C. SPENCER *vs.* JOHN MERCHANT.

Case agreed upon in a controversy submitted without action.

Plaintiff seeks to compel defendant to take title under a certain contract, and defendant declines to take title until certain assessments or taxes are paid.

The following are the facts upon which the said controversy depends: On the 20th day of June, 1883, said plaintiff and defendant entered into an agreement, in writing, whereby plaintiff agreed to sell to defendant a certain piece or parcel of land situate, lying, and being in the town of New Lots, Kings county and State of New York, bounden as follows, to wit: Beginning at a point on the easterly line of Nichols avenue distant 437 feet from the northerly line of the Brooklyn and Jamaica Railroad, measured along the easterly line of said avenue; thence north 89 degrees east along the southeasterly line of lands of James Farless 532 feet to westerly line of Elert's lane; thence south one degree thirty minutes east along the westerly line of said lane 310 feet to the northerly line of said railroad, now called Atlantic avenue; thence along the northerly
9 line of said avenue south five degrees west 530 feet to the easterly line of said Nichols avenue; thence north four degrees west along said easterly line of said avenue 437 feet to the place of beginning—for the sum of eight thousand dollars; and agreed to execute and deliver a full-covenant warrantee deed of said premises, free and clear of all incumbrances; that part of said consideration was paid and the balance was payable when the deed *is* delivered. Upon examination defendant discovered that there remained unpaid on said premises above described $1,221.73 taxes or assessments, with interest thereon from November, 1881, which defendant demanded should be paid by plaintiff, according to contract, as defendant was to receive a full covenant warrantee deed of said premises, free from all incumbrances, which plaintiff refused to do. The assessment or tax in question is an assessment or tax for laying out and grading Atlantic avenue, in the town of New Lots, Kings county, under an

act passed by the Legislature of this State August 12th, 1881 (see chap. 689), *and is* entitled "An act to provide for the payment to the State of New York of the amount charged by the comptroller to and due from the county of Kings by reason of the cancellation of the assessments for regulating and grading Atlantic avenue, authorized by chapter 217 of laws of 1870," and the time for payment of said assessment of 1881 was extended by chapter 189 of the laws of 1882. The supervisors of the county of Kings added to the sum of $40,664.96, being the principal sum paid by the State of New York (and which was the balance unpaid of the said original void assessment of 1869, together with five per cent. added thereto by the collector of taxes for the town of New Lots; each year he returned the same for five years as uncollected to the county treasurer of Kings County, the collector receiving two per cent. each year on said void principal sum and the county three per cent.), the sum of $8,293.33, being the interest paid by the State of New York on said assessment, and said supervisors also added to said principal
10 sum of said void assessment of $40,664.96 the interest on the same at six per cent. per annum from February 1st, 1879, to the day of the final conclusion of the report of said supervisors on November 3d, 1881, amounting in all to the aggregate sum of $55,653.62, as the said principal sum and interest and fees on said void assessment which they then assessed and levied upon certain property in said town, including the property in question, in pursuance of chap. 689 of laws of 1881.

The assessment so levied is that assessed by the commissioners in 1869 against the several parcels returned by the collector of taxes of the town of New Lots as unpaid to the Kings county treasurer, and by the said treasurer returned to the State comptroller, together with said interests and fees. It is on isolated parcels, not contiguous, and many of them not fronting on the avenue improved, and a great portion of the original assessment, together with most of the benefited territory, as fixed by the statute of 1869, are not included within the laws of 1881, nor directed to be taken into consideration in making the reassessment. The amount directed to be assessed under the laws of 1881 included, however, the proportional part of the expenses of the void assessment of 1869 upon the parcels mentioned, which assessment was decided to be void by the court of appeals in Stuart *vs.* Palmer, 74 N. Y., page 183.

The plaintiff claims that said assessment of 1881 in question is not a lien or cloud on the title to said premises, and defendant refuses to pay the balance of said consideration until plaintiff allows it to be deducted from the consideration money or pay the same, neither of which is plaintiff willing to do; and plaintiff also claims that the statute of 1881, chap. 689, is unconstitutional, and therefore void, for the reason that it is an attempt made by the Legislature of this State to validate a void assessment (and to do the same without giving the property-holders an opportunity to be heard as to the total amount of the assessment, only providing for a hearing on the apportionment), which was levied upon said premises under
11 and pursuant to chap. 217 of laws of 1869, as amended by chap.

619 of laws of 1870, and that the statute of 1881 is clearly void for the further reasons that the defect in the former assessment was jurisdictional, and it has been so declared and decided by the court of appeals in the case of Stuart *vs.* Palmer, 74 N. Y., page 183, and is special and invidious and unjustly and illegally apportioned upon certain individuals without reference to an uniform standard, and is an arbitrary exaction, and is levied on an individual or individuals to the exclusion of others in the same district. Defendant doubts the said claim of the plaintiff. The question submitted to the court upon this case is as follows:

Is the assessment levied on the property in 1881 in question a good and valid lien or cloud on said property?

If this question is answered in the affirmative, then judgment is to be rendered in favor of defendant and against plaintiff, requiring the plaintiff to pay said assessment and to deliver a deed according to contract.

If it be answered in the negative, then judgment is to be rendered in favor of plaintiff, requiring said defendant to take title to said premises in accordance with the contract above mentioned, without plaintiff paying said assessment or tax and without deducting same out of the consideration money.

Dated Nov. 28th, 1883.

JOHN C. SPENCER.
JOHN MERCHANT.

12 STATE OF NEW YORK, } *ss:*
County of New York, }

John C. Spencer, the above-named plaintiff, being duly sworn, says that the controversy mentioned in the foregoing case is real and that the submission is made in good faith for the purpose of determining the rights of the parties.

JOHN C. SPENCER.

Sworn to before me this 28th day of November, 1883.

W. T. BOGART,
Notary Public (48), *N. Y. Co.*

STATE OF NEW YORK, } *ss:*
County of New York, }

On this 28th day of November, 1883, before me personally came John C. Spencer and John Merchant, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same.

W. T. BOGERT,
Notary Public (48), *N. Y. Co.*

13 At a general term of the supreme court, held at the court-house, in the county of Kings and State of New York, on the 10th day of December, 1883.

JOHN C. SPENCER, Plaintiff, *vs.* JOHN MERCHANT, Defendant.

Present: Hon. Joseph F. Barnard, P. J.; Hon. Calvin E. Pratt, J.; Hon. J. O. Dykman, J.

A case agreed upon between the parties above named, without action, dated the 28th day of November, 1883, and duly verified, having been submitted to this court by Albert Day, of counsel for the said John C. Spencer, and M. G. Swart, of counsel for said John Merchant, without argument—

It is adjudged that the said John Merchant, the defendant, have judgment against John C. Spencer, the plaintiff, requiring said plaintiff to pay the said assessment mentioned in the said case, agreed upon as aforesaid, and deliver a deed of said premises, according to contract, to said John Merchant, the defendant.

Enter.

J. F. BARNARD, *P. J.*

Granted December 10, 1883.

RODNEY THURSBY, *Clerk.*

14 STATE OF NEW YORK, *County of Kings,* } *ss:*

I, Rodney Thursby, clerk of the county of Kings and clerk of the supreme court of the State of New York in and for said county (said court being a court of record), do hereby certify that I have compared the annexed with the original judgment-roll and notice of appeal filed in my office, and that the same are true transcripts thereof and of the whole of such originals.

In testimony whereof I have hereunto set my hand and affixed the seal of said county and court this 21st day of December, 1882.

RODNEY THURSBY, *Clerk.*

Notice of Appeal.

N. Y. Supreme Court, County of Kings.

JOHN C. SPENCER, Pl'ff and App'l't,

vs.

JOHN MERCHANT, Def't and Resp't.

SIRS: Take notice that the plaintiff hereby appeals to the court of appeals of the State of New York from the judgment of the general term of this court, entered on the 15th day of December, 1883, adjudging and requiring the said plaintiff to pay the assessment mentioned in the case agreed upon between the said parties herein on the premises described in said case, and to deliver a deed of said premises according to the contract mentioned in said case, and from each and every part of said judgment.

Dated Dec. 15th, 1883.

Yours, &c.,

ALBERT DAY,
Att'y for Pl'ff and App'l't, 252 Broadway, N. Y. City.

To John Merchant, Esq., def't and resp't, in person, and Rodney Thursby, clerk of Kings county.

15 Supreme Court, Kings County.

JOHN C. SPENCER, Plaintiff, *vs.* JOHN MERCHANT, Defendant.

COUNTY OF NEW YORK, *ss:*

Albert Day, plaintiff's attorney, being duly sworn, says that he cannot procure any reasons of the general term of this court for its judgment herein in favor of said defendant and against the plaintiff, entered December 15, 1883, and the clerk of the general term has informed deponent that the court has given no reasons for its said judgment.

ALBERT DAY.

Sworn to before me this 18th day of December, 1883.

W. J. JAQUES,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

16 N. Y. Supreme Court, County of Kings.

JOHN C. SPENCER *vs.* JOHN MERCHANT.

COUNTY OF NEW YORK, *ss:*

Albert Day, being duly sworn, says that he is the attorney for the plaintiff herein; that the defendant herein departed this life on the 7th day of July, 1886, having first duly made and published his last will and testament, in which he appointed his wife, Caroline L. Merchant, executrix of said will.

That the said Caroline L. Merchant caused the said will to be probated in the surrogate's court of the county of New York, and letters testamentary thereon were granted to the said executrix by the surrogate of the said county on the 6th day of October, 1886, as deponent is informed and believes.

That said executrix has taken upon herself the burden of the execution of the said will, as deponent is informed and believes.

17 That judgment in the supreme court [of] Kings county, in this State, was granted on the 10th day of December, 1885, and duly entered in the office of the clerk of Kings county on the 15th day of December, 1886, in a proceeding herein, which was in favor of the defendant herein, John Merchant, and against John C. Spencer, the plaintiff, as appellant herein, and the court of appeals of this State, upon the appeal of said plaintiff, having heard this cause argued, on the 8th day of December, 1885, did order and adjudge that the said judgment of the said supreme court appealed from herein be in all things affirmed.

That the court, on the 8th day of October, 1886, granted an order herein making the judgment of said court of appeals the judgment of this court.

That said plaintiff has been advised [by] his counsel to appeal to the United States Supreme Court from the judgment to be entered herein, and that it is necessary to have the executrix of the last will of said John Merchant, deceased, first substituted in the place

of the said deceased as defendant herein before entering judgment in this court in conformity with the judgment of the court of
18 appeals, so that the plaintiff may appeal therefrom to the Supreme Court of the United States.

That the plaintiff has only a few days in which to make said appeal, and it is necessary that a motion be made on an order to show cause, returnable less than eight days, for the substitution of the said executrix of said will of said Merchant, deceased, as defendant herein; that no previous application has been made for said order.

ALBERT DAY.

Sworn to before me this 8 day of Oct., 1886.

GEO. SEIMAN,
Notary Public, N. Y. Co.

19 N. Y. Supreme Court, County of Kings.

JOHN C. SPENCER *vs.* JOHN MERCHANT.

On the annexed affidavit of Albert Day, and on all the proceedings herein, let Caroline L. Merchant, as the executrix of the last will of John Merchant, deceased, show cause on the 11th day of October, 1886, at 10 o'clock in the forenoon, before me or one of the other justices of this court, at a special term thereof to be held at the court-house, in the city of Brooklyn, on that day, or as soon thereafter as counsel can be heard, why she, as such executrix, should not be substituted as the defendant herein *as such executrix* in the place and stead of said John Merchant, deceased, and why such further or other order may not be granted herein as may seem proper to this court. For sufficient reasons set forth in the annexed affidavit, let this order and said affidavit be served upon said executrix less than eight days before the hearing of the motion thereon.

Dated October 8th, 1886.

C. F. BROWN, *J.*

20 *Aff'd't of Service.*

N. Y. Supreme Court, Kings County.

JOHN C. SPENCER *vs.* JOHN MERCHANT.

COUNTY OF NEW YORK, *ss:*

Albert Day, being duly sworn, says that he is over the age of 21 years; that on the 9th day of October, 1886, at 307 East 57th St., in the city and State of New York, he served upon Caroline L. Merchant, personally, copies of the within affidavit and order by leaving the same with the said Merchant, and at the same time and place exhibiting to her the within originals; and that he knew the said Caroline L. Merchant to be the individual mentioned and described in said affidavit and order.

ALBERT DAY.

Sworn to before me this 9th day of October, 1886.

F. N. KELLER,
Notary Public, Kings and N. Y. Co's.

[Endorsed:] N. Y. supreme court, Kings county. John C. Spencer *vs.* John Merchant. Order to show cause. Read on motion Oct. 11, 1886. J. M. R., cl-rk. Albert Day, pl'ff's att'y, 240 B'way, N. Y.

21 N. Y. Supreme Court, County of Kings.

JOHN C. SPENCER, Pl'ff & App'l't,
vs.
JOHN MERCHANT, Def't & Resp't.

At a special term of the supreme court of the State of New York held at the court-house, in the county of Kings, on the 11th day of October, 1886—present, Hon. Edgar M. Cullen, justice—on reading and filing the affidavit of Albert Day verified herein on the 8th day of October, 1886, and order to show cause granted herein on the 8th day of October, 1886, by Mr. Justice Charles F. Brown, requiring Caroline L. Merchant, as the executrix of the last will and testament of John Merchant, deceased, why she, as such executrix, should not be substituted as the defendant herein in the place and stead of said John Merchant, deceased, after hearing Albert Day, the
22 attorney for the plaintiff, for the motion, no one appearing to oppose the same, on motion of Albert Day, plaintiff's attorney—

It is hereby ordered that the said motion be, and the same is hereby, granted.

Enter.

E. M. C.

Granted Oct'r 11, 1886.
(Copy.)

JOHN M. RANKEN, *Clerk.*

[Endorsed:] N. Y. supreme court, county of Kings. John C. Spencer, app'l't, *vs.* John Merchant, resp't. Copy [of] order substituting Caroline L. Merchant, the executrix of John Merchant, deceased, as defendant in place of said John Merchant. Albert Day, pl'ff's att'y, 240 B'way, N. Y.

23 New York Supreme Court, County of Kings.

JOHN C. SPENCER *vs.* JOHN MERCHANT.

At a special term of the supreme court held at the court-house, in Kings county and State of New York, on the 8th day of October, 1886—present, Hon. Charles F. Brown, justice—John C. Spencer, the plaintiff above named, having appealed to the court of appeals from the judgment of the general term of this court bearing date the 10th day of December 1883, which judgment was signed by

Joseph F. Barnard, presiding justice, and the clerk of this court, and duly entered in his office on the 15th day of December, 1883, and said court of appeals having affirmed the judgment of this court:

Now, on reading and filing the remittitur from the said court of appeals, and on motion of M. G. Swart, the attorney for the respondent—

24 It is ordered that the judgment of the court of appeals be, and the same is hereby, made the judgment of this court, and that the respondent, John Merchant, have execution thereon.

Enter.

C. F. BROWN, *J.*

Granted Oct. 8th, 1886.

JOHN M. RANKIN, *Clerk.*

[Endorsed:] (Ex'd.) New York supreme court, county of Kings. John C. Spencer *vs.* John Merchant. Order for judgment herein on filing the remittitur from court of appeals. M. G. Swart, def't's att'y.

25 *Judgment. October 11th*, 1886.

New York Supreme Court, County of Kings.

JOHN C. SPENCER, App'l't,
against
CAROLINE L. MERCHANT, as the Executrix of the Last Will and Testament of John Merchant, Deceased, Resp't.

On the order entered herein on the 11th day of October, 1886, on the remittitur from the court of appeals directing the judgment of said court of appeals in favor of the defendant, John Merchant, to be made the judgment of the supreme court and for costs, and on the order entered herein on the 11th day of October, 1886, substituting Caroline L. Merchant, the executrix of the last will and testament of said John Merchant, deceased, in the place and stead of said John Merchant, deceased, as the defendant herein, and on motion of Ethan Allen, the attorney for the above-named defendant, Caroline L. Merchant—

26 It is hereby ordered and adjudged that judgment be, and the same hereby is, rendered in favor of the defendant, Caroline L. Merchant, as the executrix of the last will and testament of said John Merchant, deceased, and against the plaintiff, John C. Spencer, for the sum of ninety dollars, costs and disbursements of the said appeal to the court of appeals, and the said defendant have execution therefor.

[Endorsed:] (Ex'd.) N. Y. supreme court, Kings county. 147. John C. Spencer, app'l't, *ag'st* John Merchant, resp't. (Copy.) Judgment for defendant. Filed Oct. 11, 1886, at 2.45 p. m.

27 N. Y. Court of Appeals.

JOHN C. SPENCER, Appellant, *v.* JOHN MERCHANT, Respondent.

Appeal from judgment of the general term of the supreme court, in the second judicial department, entered upon an order made December 10, 1884, which directed judgment in favor of defendant upon a case submitted under section 1279 of the code of civil procedure.

Plaintiff sought to compel defendant to perform a contract for the purchase by him of certain premises in the town of New Lots, Kings county. Defendant refused to take title and complete the purchase because of an assessment upon the land imposed under and in pursuance of chapter 689 of the laws of 1881. Plaintiff claimed this act to be unconstitutional and the assessment void.

MATTHEW HALE,
For Appellant.
M. G. SWART,
For Respondent.

FINCH, *J.*

Two objections to the constitutionality of the act of 1881, which authorized the assessment in dispute, lie at the foundation
28 of this appeal, and are, in substance, that the statute gives no hearing to the land owner as to the amount to be realized and paid, and that the assessments are levied irrespective of benefits to the lots assessed. By the act of 1869 (chap. 217), as amended by that of 1870 (chap. 619), Atlantic avenue was opened through the town of New Lots, and the compensation for the land taken and the expense of grading and regulating were imposed by two separate assessments upon a designated district determined by the Legislature to have been specially benefitted by the improvement. The assessment for grading and regulating gave no notice or hearing to the land owners, and for that reason was held to be invalid. (Stuart *vs.* Palmer, 74 N. Y., 183.) Some of these assessments appear to have been paid, but a portion of them were can-eled, and, as a consequence, returned by the collector to the treasurer of Kings county, and by him to the State comptroller, whereby the State became the creditor of Kings county for an amount which it was the object of the act of 1881 (chap. 689) to collect and pay, with the interest accrued thereon. The act of 1881 determines absolutely and conclusively the amount of tax to be raised,
29 and the property to be assessed, and upon which it is to be apportioned. Each of these things was within the power of the Legislature, whose action cannot be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reason. (Litchfield *v.* Vernon, 41 N. Y., 123–141; People *v.* Brooklyn, 4 *Id.*, 427; People *v.* Flagg, 46 *Id.*, 405; Horn *v.* Town of New Lots, 83 *Id.*, 100; Cooley on Tax, 450).

The Legislature may commit the ascertainment of the sum to be raised *and* of the benefitted district to commissioners, but is not

bound to do so, and may settle both questions for itself, and when it does so its action is necessarily conclusive and beyond review.

Here an improvement has been ordered and made, the expense of which might justly have been imposed upon adjacent property benefitted by the change. By the act of 1881 the Legislature imposes the unpaid portion of the cost and expense, with the interest thereon, upon that portion of the property benefitted which has thus far borne none of the burden. In so doing it necessarily determines two things, viz., the amount to be realized and the property specially benefited by the expenditure of that amount. The lands might have been benefited by the improvement, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open to our review. The question of special benefit and the property to which it extends is of necessity a question of fact, and when the Legislature determines it in a case within its general power its decision must of course be final.

We can see in the determination reached possible sources of error and perhaps even of injustice, but we are not at liberty to say that the tax on the property, covered by the law of 1881, was imposed without reference to special benefits. The Legislature practically determined that the lands described in that act were peculiarly benefited by the improvement to a certain specified amount, which constituted a just proportion of the whole cost and expense; and while it may be that the process by which the result was reached was not the best attainable, and some other might have been more accurate and just, we cannot for that reason question an enactment within the general legislative power. That power of taxation is unlimited, except that it must be exercised for public purposes. (Weisner *v.* Village of Douglas, 64 N. Y., 91.) Certainly, if the acts of 1869 and 1870 had never been passed, but the improvement of Atlantic — had been ordered, the Legislature might have imposed one part or proportion of the cost upon one designated district and the balance upon another. Practically, just that was done in this case. In the matter of Van Antwerp to vacate (56 N. Y., 261) an assessment for a street improvement had been declared void by reason of failure to procure necessary consents of property owners. The Legislature made a reassessment, imposing two-thirds of the expense upon a benefitted district and one-third upon the city at large.

The act was held valid as new assessment, and not an effort to validate a void one.

These views furnish also an answer to the objection that the only hearing given to the land-owner relates to the apportionment of the fixed amount among the lots assessed, and none is given as to aggregate to be collected. No hearing would open the discretion of the Legislature or be of any avail to review or change it. A hearing is given by the act as to the apportionment among the land-owners, which furnishes to them an opportunity to raise all pertinent and available questions and dispute their liability or its amount and extent. The precise wrong of which complaint is made appears to be that the land-owners now assessed never had opportunity to be

heard as to the original apportionment, and find themselves
32 now practically bound by it as between their lots and those of the owners who paid. But that objection becomes a criticism upon the action of the Legislature and the process by which it determined the amount to be raised and the property to be assessed; unless, by special permission, that is a hearing never granted in the process of taxation. The Legislature determines expenditures and amounts to be raised for their payment, the whole discussion and all questions of prudence and propriety and justice being confined to its jurisdiction. It may err, but the courts cannot review its discretion. In this case it kept within its power when it fixed, first, the amount to be raised to discharge the improvement debt incurred by its direction and, second, when it designated the lots and property which, in its judgment, by reason of special benefits, should bear the burden; and, having the power, we cannot criticise the reasons or manner of its action. The land-owners were given a hearing, and so there was no constitutional objection in that respect, nor was that hearing illusory. It opened to the land-owner an opportunity to assail the constitutional validity of the act under which alone an apportionment could be made, and, that objection failing, it opened the only other possible questions, of the mode and amounts
33 of the apportionment itself. We think the act was constitutional.

The judgment should be affirmed, with costs.

All concur, except Rapallo and Earle, JJ., dissenting.

Judgment affirmed.

I hereby certify the foregoing to be a true & correct copy of the opinion in the above-entitled case on file in this office.

Albany, Nov. 1, 1886.

H. E. SIECKELS,
State Reporter.

34 (End.:) (4.) Court of appeals. John C. Spencer, appellant, *vs.* John Merchant, respondent. Copy [of] opinion.

35 N. S. Supreme Court.

JOHN C. SPENCER, Plaintiff in Error,
against
CAROLINE L. MERCHANT, as the Executrix of the Last Will and Testament of John Merchant, Deceased.

Know all men by these presents that we, Luther L. Kellogg, of the city of New York, in the county of New York and State of New York and William H. Wells, of the city of New York, in the county of New York, and State of New York, are held and firmly bound unto Caroline L. Merchant, as the executrix of the last will and testament of John Merchant, deceased, in the full and just sum of five hundred dollars, current money of the United States, to be paid to the said Caroline L. Merchant, as executrix as aforesaid, her heirs, executors, administrators, successors, or assigns, to which payment,

well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

86 Sealed with our seals and dated this ninth day of November, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately, at a term of the supreme court of the State of New York in a suit depending in said court between the above-named John C. Spencer, plaintiff, and Caroline L. Merchant, as executrix, &c., of John Merchant, deceased, defendant, a judgment was rendered against the said John C. Spencer, and the said John C. Spencer is about to apply for a writ of error to remove the said cause to the Supreme Court of the United States to reverse the judgment in the aforesaid suit and for a citation directed to the said Caroline L. Merchant, as executrix as aforesaid, citing and admonishing her to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of October next:

Now, the condition of the above obligation is such that if the said John C. Spencer shall well and truly prosecute his writ of error to effect and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

L. LAFLIN KELLOGG. [L. S.]
WILLIAM H. WELLS. [L. S.]

Sealed and delivered in presence of—
JOHN A. SHIELDS.

37 UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

L. Laflin Kellogg and William H. Wells, being duly sworn, depose and say, and each for himself saith, that he is worth $1,000 over and above all just debts and liabilities and exemptions.

L. LAFLIN KELLOGG.
WILLIAM H. WELLS.

Severally sworn to this 9th day of November, 1886, before me—
[Seal of U. S. Commissioner Shields.]

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

The foregoing bond is approved.
November 15th, 1886.

SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

38 [Endorsed:] (Ex'd.) United States Supreme Court. John C. Spencer, plaintiff in error, *vs.* Caroline L. Merchant, as the executrix, &c., of John Merchant, deceased. Copy. Bond that pl'ff in error will prosecute his writ on appeal to effect, &c.

39 Supreme Court of the United States, of October term, in the year of our Lord one thousand eight hundred and eighty-seven. In Error.

JOHN C. SPENCER, Plaintiff in Error,

v.

CAROLINE L. MERCHANT, as Executrix, &c., Defendant in Error.

Afterward, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said John C. Spencer, by Albert Day, his attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit, that by the record it appears that the said supreme court of the State of New York and the court of appeals of the State of New York held that the statute passed by the Legislature of the State of New York, being chapter 689 of the laws of New York for the year 1881, and the proceedings thereunder were constitutional and valid, whereas the said court should have decided that the said statute and the proceedings thereunder were in violation of the Constitution of the United States and were void, for the reason that they deprived the said plaintiff and the other persons assessed thereunder of their property without due process of law.

Second. For the reason that it appears by the said record that the said supreme court of the State of New York and the said court of appeals of the State of New York held and decided that the

40 assessment mentioned in said record of $1,221.73 was a legal and valid assessment upon the lands and premises mentioned in said record, whereas the said court should have decided that the said assessment was illegal and void because the same was imposed in pursuance of an act of the Legislature of the State of New York which was unconstitutional and void.

Third. Because also by said record it appears that judgment aforesaid given was given for the said defendant against the said plaintiff, whereas by the law of the land the said judgment ought to have been given for the said plaintiff against the said defendant; and the said John C. Spencer prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

ALBERT DAY,
Attorney for Plaintiff in Error.

41 [Endorsed:] (5.) Supreme Court of the United States. John C. Spencer, plaintiff in error, *v.* Caroline L. Merchant, as executrix, &c., defendant in error. Assignment of error.